

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 27-87

CHAUFFEURS, TEAMSTERS and
HELPERS LOCAL UNION NO.190

Complainant,

vs.

CITY OF BILLINGS,

Defendant.

FINDINGS OF FACT;
CONCLUSIONS OF LAW;
RECOMMENDED ORDER

* * * * *

I. INTRODUCTION

A hearing on the above matter was held on April 12, 1988, in Billings, Montana before John Andrew. D. Patrick McKittrick represented the complainant. The defendant was represented by Paul J. Luwe, staff attorney, City of Billings.

During the course of post-hearing briefing the complainant filed a Motion To Amend Complaint. All briefs were filed as of June 15, 1988. On June 30, 1988, the defendant advised the hearing examiner it did not intend to file a response to the Motion To Amend Complaint. The matter was thus submitted on June 30, 1988.

II. ISSUE

Whether the defendant violated 39-31-401(1), 39-31-401(5) and 39-31-201 MCA by refusing to process the grievance of Jim Adkins.

1 III. FINDINGS OF FACT

2 1. James Adkins attended school at Chemeketa Communi-
3 ty College in Salem, Oregon, with the intention of becoming
4 a building inspector. As part of his training at Chemeketa
5 Mr. Adkins was required to participate in a cooperative work
6 experience program (CWE). The CWE was with the City of
7 Billings. Since the schooling at Chemeketa was all part of
8 an industrial accident rehabilitation program Mr. Adkins'
9 CWE was reviewed by Linda Reynolds, a counselor at Vocation-
10 al Resources, Inc.

11 2. Mr. Adkins CWE began in June of 1986 and continued
12 until approximately March of 1987. He was placed on the
13 City payroll as of May 6, 1987. From June 1986 until March
14 of 1987 Mr. Adkins was not paid by the City. For the month
15 of April Mr. Adkins received disability pay and in his words
16 donated this time to the City.

17 3. In June of 1986 Mr. Adkins began working eight
18 hours per day, five days per week. He did plumbing, gas,
19 building and zoning inspections. In December of 1986 he
20 also assumed duties dealing with the Billings sign ordinance
21 and continued to work a forty hour week.

22 4. Mr. Adkins was assigned a city credit card, city
23 car and a zoning inspector badge. From June 1986 throughout
24 his involvement with the City he issued citations and
25 warnings; did plumbing and mechanical inspections; and

1 generally enforced the building codes. All of the work
2 performed by Mr. Adkins was bargaining unit work and was
3 covered by the bargaining agreement.

4 5. Steve Baker was the Building Official for the City
5 of Billings. Gene Carmichael, Deputy Building Official, was
6 Mr. Adkins' immediate supervisor. Throughout his involve-
7 ment with the City Mr. Adkins reported to one or the other
8 of these people. He did so both orally and on time records
9 reporting where he had been and what he had done.

10 6. In late April a combination inspector job opened
11 up in the City of Billings. Mr. Adkins testified that Mr.
12 Carmichael told him to falsify his resume when he applied
13 for this job. Mr. Carmichael is now deceased but Linda
14 Reynolds confirmed that Mr. Adkins told her he had been told
15 by Mr. Carmichael to falsify the resume. Be that as it may,
16 the resume was allegedly falsified and Mr. Adkins was hired.

17 7. In the spring of 1987 it came to the attention of
18 Bud Henman, business representative for the Union, that Mr.
19 Adkins was doing bargaining unit work. It was not until
20 this time that Carlene DeVeau, City Personnel Director,
21 became aware that Mr. Adkins was doing bargaining unit work.
22 The Union had never concurred in CWE personnel performing
23 bargaining unit work. Once Mr. Henman and Ms. DeVeau became
24 aware of the CWE situation they sat down and began
25

1 discussions concerning the CWE program as it related to
2 bargaining unit work in the building department.

3 8. In June of 1987, after Mr. Henman had complained
4 of Mr. Adkins' presence in the building department, the City
5 in accordance with the Union Security Clause, Article 3,
6 withheld Union dues from Mr. Adkins pay - this in spite of a
7 six month grace period.

8 9. Mr. Adkins was terminated on July 8, 1987.

9 10. From the testimony it is apparent that several
10 portions of the contract (Complainant's Exhibit #3) are at
11 issue. They are listed below.

12 Article 10.7, B, provides:

13 For other than serious infractions,
14 disciplinary actions shall be based upon
15 progressive discipline based upon
16 warning letters, suspension and/or
17 termination. The employee and the Union
18 shall be notified in writing of any
19 disciplinary action within fifteen (15)
20 days after the violation, or the first
21 knowledge of the violation in question
22 is known to the City.

23 Article 10.7, C, goes on to provide:

24 New employees shall be on probation for
25 a period of six (6) months from the date
of their employment and may be dis-
charged at the sole option of the
Employer without recourse to the griev-
ance procedure. Probationary periods
for seasonal/temporary employees shall
be from the first day of employment as a
permanent employee in a new job classi-
fication.

1 Article 10.9 provides:

2 The City agrees to notify the Union each
3 Monday morning of all new hires within
4 the bargaining unit excluding seasonal/-
5 temporary help. However, the City
6 agrees to notify the Union if the
seasonal/temporary help should become a
full-time regular or part-time employee.
The City shall also notify the Union of
all terminations.

7 Article 4, Seniority, provides:

8 Seniority means an employee's length of
9 continuous service with his or her
10 division and shall be computed from the
date the employee began service in the
division.

11 Article 2 E, provides the definition of seasonal
12 and temporary employees. Specifically it provides:

13 The City agrees that any seasonal,
14 temporary, or on call employee will be a
15 member of the bargaining unit if that
employee works for more than 132 days in
a 365 day period in any twelve month
period.

16
17 11. James Adkins was discharged without recourse to
the grievance procedure.

18 III. CONCLUSIONS OF LAW

19 The City of Billings refused to process the grievance
20 of James Adkins on the grounds that Mr. Adkins was a proba-
21 tionary employee and not entitled to the grievance procedure
22 because of Article 10, Paragraph 10.7, C. The Union takes
23 issue with the position of the City and contends that the
24 contract does apply to Mr. Adkins' situation.
25

1 Bud Henman testified based on his understanding of the
2 contract - an understanding gained as chief negotiator for
3 the Union - that Mr. Adkins, because he had been doing
4 bargaining unit work was not a "new employee" and thus was
5 entitled to the grievance process. Moreover, it was
6 Henman's understanding that the contract provisions requir-
7 ing written notice of disciplinary matters applied to all
8 employees, whatever their status.

9 Mr. Henman's disagreement with the City over this
10 interpretation of the contract when coupled with the plain
11 language of the contract is convincing that this matter
12 should proceed through the grievance process. Article 5,
13 Paragraph 5.1 provides:

14 A grievance is defined as a dispute or
15 difference of interpretation between an
16 employee and the employer involving an
17 economic or disciplinary issue as
18 expressly provided in the terms of the
19 agreement. Disciplinary actions,
20 involving warning letters, suspension,
21 or discharge shall be grievable; all
22 lesser disciplinary actions are not
23 grievable....

24 This language is broad in its intent. It is to afford
25 the grievance procedure to an employee who has a dispute
with the application of disciplinary actions. It is also
intended to cover differences in the interpretation of the
terms of the agreement. That is precisely what the com-
plainant is asking - to have the terms of the agreement
interpreted through application of the grievance procedure.

1 From the testimony and evidence it cannot be said with
2 positive assurance that the City is correct in its interpre-
3 tation of the meaning of the contract. Conversely, it
4 cannot be said with positive assurance that the Union is
5 incorrect in the way it interprets the contract. Therefore,
6 the processing of the grievance up to and including binding
7 arbitration is required. See United States Steelworkers of
8 America v. Warrior and Gulf Navigation Company, 363 US 564,
9 80 S. Ct. 1343, (1960)

10 The City of Billings committed an unfair labor practice
11 by failing to process the grievance of James Adkins. See
12 City of Livingston vs. Montana Council No. 9., 174 Mont.
13 421, 571 P.2d 374. In failing to process the grievance the
14 City violated 39-31-401(5) MCA. Derivatively the City also
15 violated 39-31-401(1) MCA and 39-31-201 MCA. The City is
16 not prejudiced by the amendment to the complaint.

17 V. RECOMMENDED ORDER

18 1. It is hereby recommended and this does order that
19 the City of Billings cease and desist from refusing to abide
20 by the terms of the collective bargaining agreement and
21 process the grievance of James Adkins as per the contract;

22 2. that the City of Billings cease and desist from
23 its violation of 39-31-201 MCA, 39-31-401(1) MCA and
24 39-31-401(5) MCA;
25

1 3. that the Board of Personnel Appeals be advised in
2 writing that the grievance procedure is being implemented;

3 4. that the Board of Personnel Appeals be advised in
4 writing as the grievance proceeds through each step of the
5 grievance procedure up to and including final resolution;

6 5. that the document titled NOTICE attached hereto be
7 posted on bulletin boards where employee information is
8 usually posted. This notice is to be posted in each and
9 every work place where a member of Teamsters Local 190
10 works.

11 Dated this 12th day of July, 1988.

12
13 BOARD OF PERSONNEL APPEALS

14 BY: *John Andrew*

15 John Andrew
16 Hearing Examiner

17 NOTICE: Exceptions to these Findings of Fact, Conclusions
18 of Law and Recommended Order may be filed within twenty (20)
19 days of service. If no exceptions are filed, the Recommended
20 Order will become the Order of the Board of Personnel
21 Appeals.

22 * * * * *

23 CERTIFICATE OF SERVICE

24 The undersigned does certify that a true and correct
25 copy of this document was served upon the following on the
26 12th day of July, 1988, postage paid and addressed as
27 follows:

28 D. Patrick McKittrick
29 McKittrick Law Firm
30 P. O. Box 1184
31 Great Falls, MT 59403

32 Paul J. Luwe
33 Staff Attorney
34 City of Billings
35 City Attorney's Office
36 P. O. Box 1178
37 Billings, MT 59103-1178

38 *Dora Christianson*

1 * * * * *

2 NOTICE

3 THE MONTANA BOARD OF PERSONNEL APPEALS HAS DETERMINED
4 THAT THE CITY OF BILLINGS HAS COMMITTED AN UNFAIR LABOR
5 PRACTICE BY FAILING TO PROCESS THE GRIEVANCE OF JAMES ADKINS
6 IN VIOLATION OF SECTIONS 39-31-201, 39-31-401(1) AND
7 39-31-401(5) MCA. THE CITY OF BILLINGS HAS BEEN ORDERED TO:

- 8 1. Process the grievance of James Adkins.
9 2. Cease and desist from violation of 39-31-201,
10 39-31-401(1) and 39-31-401(5) MCA.
11 3. Advise the Board of Personnel Appeals in writing
12 that the grievance procedure has been implemented.
13 4. Advise the Board of Personnel Appeals in writing as
14 each step of the grievance procedure is completed
15 up to and including final resolution.

16 Dated this _____ day of _____, 1988.

17 CITY OF BILLINGS

18 By _____
19 City Manager

20 This notice shall remain posted for a period of 60
21 consecutive days from the date of posting and shall not be
altered, defaced or covered.

22 Questions about this notice or compliance therewith may
23 be directed to the Board of Personnel Appeals, P. O. Box
24 1728, Helena, Mt. 59624.
25